ESTTA Tracking number: **ESTTA697204**

Filing date: **09/21/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85925285
Applicant	The Pedowitz Group, LLC dba The Pedowitz Group
Applied for Mark	THE REVENUE MARKETING AGENCY
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Applicant:	THE PEDOWITZ GROUP, LLC, d/b/a THE PEDOWITZ GROUP	Application Serial No. : 85/925,285
Mark:	**THE REVENUE MARKETING AGENCY**	
Filed:	May 7, 2013	Attorney Docket No: 10217-807US1

APPLICANT'S APPEAL BRIEF

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INTRODUCTION

Applicant the Pedowitz Group hereby appeals from the Examining Attorney's final refusal under Sections 2(e)(1) of the Trademark Act to register the mark THE REVENUE MARKETING AGENCY for "advertising and marketing consultancy" in Class 35. Applicant respectfully requests that the Board reverse the refusal to register.

ARGUMENT

I. THE REVENUE MARKETING AGENCY IS NOT MERELY DESCRIPTIVE

To be merely descriptive, a term must directly and immediately give some reasonably accurate or tolerably distinct knowledge of the characteristics of a product or service. *In re Abcor Development Corp.,* 588 F. 2d 811, 200 USPQ 215 (CCPA 1978); *In re Pennzoil Products Co.,* 20 USPQ 2d. 1753 (TTAB 1991). The immediate idea must be conveyed with a "degree of particularity." *In re TMS Corp. of the Americas,* 200 USPQ 57, 59 (TTAB 1978). A mark is thus merely descriptive if it does nothing but describe the recited goods or services. *In re Colonial Stores, Inc.*, 394 F. 2d 549 157 USPQ 382, 385 (CCPA 1968).

In contrast, a suggestive term requires some "imagination, thought, or perception to reach a conclusion as to the nature of the goods." TMEP 1209.01(a). A mark that connotes two meanings – one possible descriptive and one suggestive of something else – is *not* merely description *Blisscraft of Hollywood v. United Plastics Co.,* 294 F. 2d 694, 131 USPQ 55 (2nd Cir. 1961).

Here, the Examining Attorney effectively asserts that that "THE REVENUE MARKETING AGENCY" has but a single descriptive meaning – that of educational services concerning a type of marketing – "THE REVENUE MARKETING AGENCY." That assertion, however demonstrates that, in fact, there are other meanings, suggestive meanings that allow for

registration of the mark. As explained above, there is no such thing as "marking revenue." Rather, a business markets its goods or services in hopes of generating revenue. But, adopting the Examiner's position, "THE REVENUE MARKETING AGENCY" necessarily has only one meaning. However, the Examining Attorney has also conceded that marketing is a process or a set of techniques for the promotion, sale and distribution of a product or service. Thus at a minimum, the term "THE REVENUE MARKETING AGENCY" necessarily means more than merely "marketing revenue" because one would traditionally market goods or services. In fact, the term "THE REVENUE MARKETING AGENCY" is incongruous, a double entendre. While "marketing" and "revenue" are known terms, one does not actually "market revenue." While these terms are individually in common usage, they are not typically connected or juxtaposed one with the other. The same is even more true when considering the mark as a whole. Thus, even if use of 'THE REVENUE MARKETING AGENCY" by the Applicant may not have originally uniformly reflected such trademark status, the mark does, in fact, function as a trademark.

More particularly, the Applicant provides marketing and demand generation services related to the following:

1. Messaging and branding;
2. Buyer personal development;
3. Creative design;
4. Context marketing;
5. Search engine marketing;
6. Campaign development;
7. Tales enablement; and

8. Analytics and reporting.

Applicant therefore does not merely "market revenue." In fact, as explained above, that is impossible to do. As a result, use of the terms "revenue" and "marketing" in the Applicant's mark is, at most, suggestive of Applicant's services. The Examining Attorney has taken the position the term "revenue" means money generated from business, and the term "marketing" refers to the advertising, sales and/or promotion of goods and/or services for a business. However, because "revenue" is not a good or service, one cannot "market" the good or service of "revenue." The Examining Attorney then puts the dissected components together to conclude that "the term 'THE REVENUE MARKETING AGENCY' is understood in the marketing field as a type of marketer, specifically, a person or organization engaged in . . . marketing . . . that also is responsible for the revenue generated by his or her efforts.

It goes without saying that being "accountable" for marketing activities does not "market" or "generate revenue." In fact, the Examining Attorney's most recent statement is at odds with the prior statement that the term refers to a type of marketing professional that engages in marketing tasks directed at increasing revenue. Being "accountable" for marketing activities does not generate revenue. If, in fact, THE REVENUE MARKETING AGENCY is a "type" of marketing, then it logically follows that a "THE REVENUE MARKETING AGENCY" would practice that type of marketing. The Examining Attorney has not and cannot take that position because there is no factual support for it. Moreover, any person can be "accountable" for a function. Rather, the business services at issue relate to addressing best practices in various marketing techniques – none of which are so-called "THE REVENUE MARKETING AGENCY" because there is no such "type of marketing."

The materials relied upon by the Examining Attorney are not to the contrary. While some of these uses are, admittedly improper (not trademark uses), many of them are references to Applicant and Applicant's services. See Office Action dated November 14, 2012, attachments 6-7, and 15-16; Office Action dated June 19, 2013, attachments 17-18; Office Action dated January 8, 2014, attachments 38-39, 44, 47 and 50; Office Action dated August 15, 2014, attachments 6-13; and Paragraph No. 10 to Declaration of Jeff Pedowitz in Support of Acquired Distinctiveness under Section 2(f), 15 U.S.C. §1052(f) filed on July 8, 2014. Thus, the record consists of a mixture of uses that fail to show that the instant mark is merely descriptive.

Further, the power of "THE REVENUE MARKETING AGENCY" as used by the Applicant lies in the fact that the relevant consumers do not inherently link "marketing" and "revenue" together (especially in the context of business services and related educational services), further supporting the fact that one cannot "market revenue." Therefore, consumers would have to exercise mature thought or follow a multi-stage reasoning process in order to understand the types of services offered in connection with the mark as a whole. Thus, the mark as a whole is neither generic nor descriptive. Even adapting the Examining Attorney's flowed rationale, there is no evidence, nor would a person expect, that a person practicing "THE REVENUE MARKETING AGENCY" would perform only a single type of marketing. The Examining Attorney's "evidence" shows that such a hypothetical person performs multiple forms or types of techniques. The term therefore cannot be, even adopting the Examining attorney's rationale, merely descriptive of a type of marketing. Thus, the Examining Attorney's position is unsupported. To the contrary, the mark is not only capable of functioning, it is functioning to identify Applicant as the source of the online educational services being offered for a broad range of business services. See Exhibits 1 and 2 to Declaration of Jeff Pedowitz in Support of Acquired

Distinctiveness under Section 2(f), 15 U.S.C. §1052(f) filed on July 8, 2014; Office Action dated November 14, 2012, attachments 6-7 and 15-16; Office Action dated June 19, 2013, attachments 17-18; Office Action dated January 8, 2014, attachments 38-39, 44, 47 and 50; Office Action dated August 15, 2014, attachments 6-13; and Paragraph No. 10 to Declaration of Jeff Pedowitz.

Still further, a mark may be distinctive and registerable if it creates a new commercial impression separate and apart from the descriptive nature of descriptive terms. In fact, the registerability of a mark created by combining only descriptive words depends on whether a new and different commercial impression is created, and/or the mark created imparts an incongruous meaning as used in connection with the goods and/or services. TMEP §1209.03(d). The mark is merely descriptive only if the combination of descriptive words creates no incongruity, and no imagination is required to understand the nature of the goods or services. In other words, the only meaning of the subject mark is the descriptive meaning.

In contrast, a "double entendre" is a word or expression capable of more than one interpretation. A "double entendre" is an expression that has a double connotation or significance *as applied to the goods or services*. The "double entendre" is not refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services. Thus, in *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983), the Board the mark "LIGHT N' LIVELY" for reduced calorie mayonnaise, stating as follows:

> The mark "LIGHT N' LIVELY" as a whole has a suggestive significance which is distinctly different from the merely descriptive significance of the term "LIGHT" per se. That is, the merely descriptive significance of the term "LIGHT" is lost in the mark as a whole. Moreover, the expression as

a whole has an alliterative lilting cadence which encourages persons encountering it to perceive it as a whole.

See also In re Symbra'ette, Inc., 189 USPQ 448 (TTAB 1975) (holding SHEER ELEGANCE for panty hose to be a registerable unitary expression.

The multiple interpretations that make an expression a "double entendre" must be associations that the public would make fairly readily, and *must be readily apparent from the mark itself*. *See In re Wells Fargo & Co.*, 231 USPQ 95, 99 (TTAB 1986) (holding EXPRESSERVICE merely descriptive for banking services, despite applicant's argument that the term also connotes the Pony Express, the Board finding that, in the relevant context, the public would not make that association).

In view of the foregoing, the subject mark here is properly viewed as registerable because it is in the nature of a double entendre and not merely descriptive nor generic. The Examiner has focused on a perceived single meaning – that gained by applying standard dictionary definitions. Marketing, however, constitutes the act of promoting and selling goods and services, and can include such activities as "market research." Revenue is income received as a result of conducting or performing business activities. The Examining Attorney, applying similar definitions, concludes that the only meaning the public can take from the combined mark "THE REVENUE MARKETING AGENCY" is that of marketing revenue.

The relevant public would not and does not so recognize the mark. Rather, "THE REVENUE MARKETING AGENCY" refers to the suite of services offered by the applicant but, according to the Examining Attorney's conclusion, a "THE REVENUE MARKETING AGENCY" is accountable for marketing activities that generate revenue. The position is not supportable because essentially all marketing techniques would (hopefully) generate revenue. A

person cannot practice a "type of marketing" and be accountable for all types of marketing. If the Examining Attorney is correct, and the mark evoked only a single connotation of a single type of marketing, the fact the Applicant offers business management and consulting services under the mark creates the alternative meaning a double entendre. Again, we cannot, and the Applicant does not, market revenue. One can, however, devise marketing strategies that will contribute to or perhaps generate revenue. The scope of services offered by Applicant under the mark (above) confirms the many multiple meanings. The relevant public is business savvy and recognizes that one cannot market revenue. Thus, the relevant public must and does and does ascribe other different meanings, to the term; they use the term to identify Applicant's business and educational offerings. This is an instance where, as shown in Applicant's CEO's declaration, the public is already making the association with the Applicant because the term does necessarily not mean merely marketing revenue (especially since that cannot be done). The relevant public here must and does associate the term "THE REVENUE MARKETING AGENCY," and thus the mark "THE REVENUE MARKETING AGENCY," with the services provided by the defendant because there is no "type" of marketing that provides or allows one to market revenue. As with the "LIGHT 'N LIVELY" mark, any merely descriptive significance of the term "revenue" becomes lost in the mark as a whole for the very reason that there is no such class or type of marketing. Accordingly, the present mark is registerable as a "double entendre" in that it comprises an expression that has a double connotation or significance *as applied to the goods or* services and is not generic. The "double entendre" here should not be refused registration as merely descriptive because one of its meanings is not merely descriptive in relation to the goods or services.

When the mark "THE REVENUE MARKETING AGENCY" is considered in its entirety, the multiple meanings are even more apparent. Applying the Examining Attorneys assertion, the mark "THE REVENUE MARKETING AGENCY" would particularly (and only) describe a person that provides a certain type of marketing. However, as conceded by the Examining Attorney, the Applicant's services are substantially broader than just that one "type." Rather, under the mark "THE REVENUE MARKETING AGENCY," Applicant offers a range of business consulting services from which a member of the relevant public may select. In other words, Applicant does not merely offer a single service that the Examining Attorney contends is a "type" of marketing. Applicant offers a wide range of business services, and the mark is applied to all of those other marketing services, all of which are capable of resulting in revenue. Thus, in addition to the multiple meanings, incongruity and double entendre of "THE REVENUE MARKETING AGENCY," the mark as a whole is capable of and evokes multiple meanings. In such cases, the mark has been found to be registerable due to the multiple meanings. *See, e.g., In re Vaughan Furniture Co.*, 24 USPQ 2d 1068 (TTAB) (PINE CRAFTS registerable on Principal Register, various meanings of "crafts"); *In re The Noble Company*, 225 USPQ 749 (TTAB 1985) (NOBURST registerable for anti-freeze).

II. "THE REVENUE MARKETING AGENCY" HAS, ALTERNATIVELY, ACQUIRED SECONDARY MEANING

Yet even if the mark were still considered to be merely descriptive, Applicant has made a persuasive showing of acquired distinctiveness under Section 2(f) of the Trademark Act. 37 CFR §2.41 provides that the Applicant may show that a mark has become distinctive by affidavits or declarations showing the declaration, extent and nature of use in commerce, or other appropriate evidence, tending to show that the mark distinguishes the Applicants goods or services. Applicant acknowledges the well-established principle that it bears the burden of establishing

secondary meaning. *In re Hollywood Brands, Inc.,* 214 F. 2d 139, 140, 102 USPQ 294, 295 (CCPA 1954). The issue is a question of fact.

In this case, the Applicant has submitted evidence from which the Board may "reasonably conclude" that the Applicant has presented a *prima facie* ease of secondary meaning.

Applicant has extensively used the mark since October 17, 2012, and has widely promoted its services on a nationwide basis. As a result of such use and promotion, the public has come to recognize and rely on the mark as identifying Applicant's services. See the article entitled "A New Breed: THE REVENUE MARKETING AGENCY" by Go To Market Strategies, Inc. provided in a link in Paragraph No. 10 to Declaration of Jeff Pedowitz in Support of Acquired Distinctiveness under Section 2(f), 15 U.S.C. §1052(f). A copy of the actual article is submitted herewith as Exhibit 1 for the Board's ease of reference. Still further, Applicant is the owner of Supplemental Registration Nos. 3,888,303 ("REVENUE MARKETER") and 3,949,497 ("REVENUE MARKETING Index"), both of which show use of more than five (5) years. Applicant's supplementary submission supports its distinctiveness claim. See the article entitled "CRM Watchlist 2014 Winners: the Final…Three – IBM, Solvis Consulting, The Pedowitz Group," by Paul Greenberg for Social CRM: The Conversation attached hereto as Exhibit 2. Applicant's showing is far more than sufficient to demonstrate that the mark "THE REVENUE MARKETING AGENCY"; even if considered "merely descriptive, has acquired distinctive under Section 2(f) of the Trademark Act.

Finally, the Examining Attorney has stated in other related actions that the Applicant did not fully respond to certain questions, namely:

1) Do the applicants' services concern revenue?
2) Do the applicant's services concern marketing?
3) Do the applicant's services concern revenue marketing?
4) Are the applicant's services provided by an agency?

5) Does the wording "revenue" or "marketing" or "agency" or "revenue marketing" or "marketing agency" or "revenue marketing agency" have any meaning or significance, either in the industry in which goods/services are manufactured/provided or as applied to the applicant's particular goods/services (perhaps as a term of art)?

By the following, Applicant confirms its responses.

First, Applicant responds again that its services do concern marketing and using "best practice" marketing techniques to increase, hopefully, revenue from increased sales of goods and services. Applicant restates that there is no such type of marketing entity as "THE REVENUE MARKETING AGENCY." Applicant acknowledges that certain websites have used the term "Revenue Marketing." Applicant restates that such uses are improper and of no legal significance. Proper use of "THE REVENUE MARKETING AGENCY" refers to the suite of business consulting services offered by the Applicant. The fact that a relatively few, isolated instances of improper use have been located by the Examining Attorney (unknown to the Applicant) does not alter Applicant's view or render it non-responsive. *See In re Merrill Lynch, Pierce, Fenner and Smith, Inc.,* 828 F.2d 1567 (Fed. Cir. 1987). Applicant is without knowledge sufficient to state "how many THE REVENUE MARKETING AGENCYs are there currently in the United States." Applicant, as stated, submits that only the Applicant properly uses the term as a trademark. Moreover, the question incorrectly presents the inquiry. Finally, as acknowledged by the Examining Attorney, Applicant's THE REVENUE MARKETING AGENCY services provide a "best practices" approach to marketing that Applicant strongly believes and provides superior results for its clients. Such information would be proprietary. Regardless, this question also incorrectly preserves the inquiry; it postulates that there are "other types of marketing." Applicant further restates that while others have made isolated use of "Revenue" and "Marketing," they have not, to Applicant's knowledge have any specific meaning

or significance as a term of art. As explained above, there is no such thing as a type of marketing known as "THE REVENUE MARKETING AGENCY." Applicant submits that a relatively few, isolated uses do not rise to such a level. Applicant believes the term is properly used only as a trademark identifying Applicant and its services.

In view of the foregoing, Applicant respectfully submits that it answered, forthrightly, all of the Examining Attorneys questions and that such responses provide no basis for a rejection of the pending application. To the extent any further response is deemed necessary or helpful, Applicant requests that the application be remanded for that purpose.

III. CONCLUSION

This Appeal is one of several related appeals. Applicant hereby incorporates by reference the relevant arguments from such other appeals including Application Serial Numbers 85/681,691; 85/681,578; 85/925,285 and 85/681,578. The Board has recognized, particularly with respect to whether a mark is suggestive or descriptive, that doubt must be resolved in favor or the Applicant. *See In re Conductive Systems, Inc.*, 220 USPQ 84 (TTAB 1983); *In re Morton-Norwich Prods., Inc.,* 209 USPQ 791 (TTAB 1981) (COLOR CARE registerable for laundry bleach). Applicant submits that do not here should likewise be resolved in its favor. This is particularly applicable given applicant's previous use of the mark in such a prominent way, in addition to widespread use of THE REVENUE MARKETING AGENCY as a trade may, and Applicant's existing registrations. Accordingly, Applicant respectfully request that the refusal to register be withdrawn and the mark passed on to publication.

MEUNIER CARLIN & CURFMAN LLC

Date: September 21, 2015

/Stephen M. Schaetzel/
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